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In The

Supreme Court of the United States

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al.,

Appellant,

vs.

MERREL CLINE and L. R. BRETZ,

Respondents.

BRIEF FOR THE APPELLANTS

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JURISDICTION

The Ninth Circuit Court of Appeals' decision in effect declared a Montana statute unconstitutional, and held erroneous the Montana Supreme Court's determination that the statute is constitutional. The Supreme Court of the United States has jurisdiction to review by direct appeal the opinion complained of by the provisions of 28 U. S. C. 1254 (2).

Appellees Cline and Bretz were charged with nine counts including obtaining money by false pretenses (App. 1). A jury was empaneled and sworn, and Appellees moved to exclude any evidence with respect to the charge of obtaining money by false pretenses (and two other counts) for the reason that the Information (because of a typographical error) alleged the crime to have been committed *after* it had been repealed. The State district court dismissed the charge sua sponte. The State dismissed the remaining counts and filed a new Information (App. 2), setting forth the same count of obtaining money by false pretenses that was in the original Information. The Appellees objected on the grounds of double jeopardy, denied. The Appellees petitioned the Montana Supreme Court for a writ of habeas corpus, denied. Trial was held, resulting in a conviction, and Appellees petitioned for a writ of habeas corpus in the United States District Court for Montana (App. 3), on the grounds of double jeopardy. The writ was denied, and Appellees appealed to the Circuit Court of Appeals for the Ninth Circuit. That Court reversed, in effect holding that the Montana statute (Jur. St. App. D) (which permits reprosecution unless the first witness has been sworn) is unconstitutional, and that the Montana Supreme Court's determination that the statute is constitutional (App. 4) was erroneous.

The State's remedy by appeal is under the provisions of 28 U. S. C. § 1254 (2). *Dutton v. Evans,* 400 U. S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970).

QUESTIONS PRESENTED

1. Can Montana determine by statute that jeopardy attaches in a trial when the first witness is sworn, or must it conform to the Federal Procedural Rules which establish the swearing of the jury as the point at which jeopardy attaches?

2. Or, is Section 95-1711 of the Revised Codes of Montana, 1947, as amended, constitutional in light of the double jeopardy provisions of the Fifth Amendment to the United States Constitution?

3. Assuming that this Court were to hold that jeopardy attaches in state proceedings when the jury is sworn, does the doctrine of "manifest necessity" nevertheless require that a trial be held?

STATEMENT OF THE CASE

The petition for writ of habeas corpus by Appellee Bretz in the United States District Court was made a part of the stipulated Appendix (App. 3) for the sole purpose of setting out the background facts, and the State agrees that the facts set forth therein are substantially correct.

The Information No. 3921 (App. 1) in this matter was filed on October 3, 1974, in Lewis and Clark County, State of Montana, charging Cline and Bretz with the commission of nine felonies. On March 19, 1975, a jury was empaneled and sworn; no witnesses were sworn. Before opening statements and before any evidence had been offered, the jury was excused as defense counsel presented several mo-

tions to the court. The most important of these motions sought to restrict the State's evidence to the allegations of the Information. This was aimed at Count II (obtaining money and property by false pretenses), although two other counts were similarly involved; the Information mistakenly charged that the conduct constituting this offense had occurred between January 13, 1974 (instead of 1973) and February 19, 1974. The Montana Criminal Code, 1973, a sweeping, comprehensive revision of the substantive law of the State, took effect January 1, 1974, repealing all previous criminal laws, including the charging statute.

The State resisted the attempt to excise Count II from its case, and on March 21, 1975 moved to amend Count II to correct the typographical error. On March 24, 1975, the trial court denied this motion and sua sponte dismissed Count II for failing to state an offense. After the Montana Supreme Court declined to grant the State's petition for a writ of supervisory control, the State returned to the trial court and moved to dismiss the remaining counts in order to file a new Information. The trial court granted the motion, and discharged the jury on April 4, 1975; a second Information, No. 3963 (App. 2), alleging the commission of two felonies by Appellees was filed on the same day. Count I, grand larceny, was the same as the first Information, a count dismissed by the State. Count II, obtaining money by false pretenses, was the same as the first Information, but with the corrected date. Appellees' motions to dismiss on the grounds of double jeopardy were filed on April 25, 1975 and denied on May 1, 1975. Appellee Bretz filed a petition for habeas corpus with the Supreme Court of Montana alleging double jeopardy. This was denied by that court on July 23, 1975, *Bretz v. Sheriff*,

(1975) 539 P. 2d 1191. On September 2, 1975 the Supreme Court denied a rehearing. A trial commenced in the State District Court of the First Judicial District on June 16, 1975, and on July 2, 1975 Bretz and Cline were found guilty of obtaining money by false pretenses—one of the same counts that had been dismissed in the earlier proceeding by the trial court because of a typographical error.

Bretz and Cline filed separate petitions for writs of habeas corpus in the United States District Court for the District of Montana, Billings Division (App. 3), and the matters were ordered consolidated with that of a similar petition filed by Clancy Cunningham. On December 31, 1975 the Honorable James F. Battin denied the petition. *Cunningham, et al. v. Montana,* 406 F. Supp. 430 (D. Mt. 1975) (Jur. St. p. 42).

(*State v. Cunningham* (App. 4) involving the same question, was decided by the Montana Supreme Court, and is inserted in the Appendix here by reason of the fact that the Montana Supreme Court refers to that opinion as controlling in denying the writ of habeas corpus of appellee Bretz, *Bretz v. Sheriff, supra.* Cunningham also petitioned the United States District Court, and the petitions of Appellees here and Cunningham were consolidated. Thereafter, Cunningham died, and his appeal to the Ninth Circuit Court of Appeals was dismissed. Thus, the reason that his name figured so prominently in the proceedings below, but not now.)

Notices of appeal to the Ninth Circuit Court of Appeals were filed by Bretz and Cline, and the matters were again consolidated. In their opinion filed November 19, 1976 (Jur. St. p. 13), the Ninth Circuit Court of Appeals

reversed the lower court, ruling that the State's statute did not control when jeopardy attached in the first proceeding and that under federal rule the defendants had been placed in jeopardy in violation of the Fifth Amendment. The court went on to reverse the other part of the lower court's decision which held that even if jeopardy had attached, the doctrine of "manifest necessity" required that the trial be held. The Appellants herein duly filed their notice of appeal.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was decided and filed on November 19, 1976, and is in the Jurisdictional Statement at page 13. The opinion of the United States District Court, District of Montana, reversed by the Ninth Circuit Court of Appeals is in the Jurisdictional Statement, at page 42.

SUMMARY OF ARGUMENT

"(The United States Supreme) Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge', *U. S. v. Jorn*, 400 U. S. 470, at 479. See *Kepner v. United States*, 195 U. S. 100, 128, 130-131 (1904); *United States v. Macdonald*,

207 U. S. 120, 127 (1907); *Bassing v. Cady*, 208 U. S. 386, 391-392 (1908); *Collins v. Loisel*, 262 U. S. 426, 429 (1923)", *Serfass v. United States*, 420 U. S. 377, at 388 (1975). Montana statutes provide that the defendant is not put to trial before the trier of the facts until the first witness is sworn, Section 95-1711, R. C. M. 1947, as amended. Jur. St. p. 55). (That lengthy statute can be condensed to read as follows:

> "(3) When Prosecution Barred by Former Prosecution.
>
> " . . . A prosecution based upon the same transaction as a former prosecution is barred by such former prosecution under the following circumstances:
>
> (a)-(c) . . .
>
> (d) the former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. . . ."

The Ninth Circuit Court of Appeals takes the position that jeopardy attaches, in a jury trial, when a jury is empaneled and sworn, citing *Downum v. United States*, 372 U. S. 374 (1963), *Illinois v. Somerville*, 410 U. S. 458 (1973), and *Serfass v. United States, supra*. It is the position of the Appellant that there is "a point in criminal proceedings at which the constitutional purposes and policies are implicated". *United States v. Jorn, supra*, at 480; *Serfass v. United States*, at 388, and that that point is when the court begins to hear evidence, i. e., at the point when the first witness is sworn, as is recognized in a non-jury trial, *Serfass v. United States*, at 388. And, that the

pronouncements of this Court in the past that in a jury trial, jeopardy attaches when a jury is empaneled and sworn, have arisen under circumsances when this precise point was not in dispute.

Putting it another way, the rule has previously been announced, but the reason for the rule has never been.

The background of the federal rule is obscure, at best. 1 Bishop Crim. Law §§ 1012, 1014, 1015 (8th Ed. 1892) states that the greater weight of authority has jeopardy attaching when the jury is sworn, and cites a number of *State* cases for the authority. And See: *Simmons v. United States,* 142 U. S. 148, 152 (1891) for a similar determination. There is no starting point, it just emerged, without opposition. The states were not bound by the rule, and the Doctrine of Manifest Necessity was sufficiently liberal as to not make much difference. The point is, for at least this century, there has been no other rule in federal courts. This has not always been the rule in the States, but not until 1969, in *Benton v. Maryland,* 395 U. S. 784, is the Fifth Amendment applicable to the states, i. e., not until then does the occasion arise to examine the federal rule in the light of the state rule, as to when jeopardy attaches. Again, putting it another way, *Serfass v. United States, supra,* simply states that jeopardy attaches when a jury is empaneled and sworn, and cites *Downum v. United States, supra,* and *Illinois v. Somerville, supra. The reason for the rule was not given,* nor did it need to be, for Serfass was concerned with a fact situation arising before a jury trial had been set.

Illinois v. Somerville, supra, at page 467, gives the rule, and cites *Downum, supra,* as authority, *without going into the reason.* The fact of the matter is, the rule was assumed, and *Somerville* was a "manifest necessity" case. No one argued the rule, for the Illinois Rule and the Federal Rules were the same. (Justice Tuttle, speaking for the Ninth Circuit Court of Appeals [Jur. St. p. 27], stated that this argument "erroneously equates a circumstance with a dispositive factor in a Supreme Court opinion. The *Somerville* court never mentions the state rule, and a thorough sifting of the opinion fails to discover even a shard of evidence suggesting that the court did not consider federal standards controlling". It may have been just a circumstance, but there was no reason for Illinois to raise the point. Illinois had no alternative. "Manifest necessity" was the only point in issue, whether a circumstance or dispositive.) And *Somerville* cited *Downum.*

Downum was clearly a "manifest necessity" case . . . *the federal rule as to when jeopardy attaches was assumed, and never debated.* The fact situation in *Downum* arose at a point when the jury had been empaneled and sworn, but before any witness had been sworn. Justice Tuttle put Montana's dilemma very succinctly when he stated, "since the mistrial in *Downum* had been declared after the first jury was empaneled but before any evidence had been introduced, 372 U. S. at 741 (Clark, J., dissenting); *Downum v. United States,* 300 F. 2d 137, 139-40 (5th Cir. 1962), the case necessarily stands for the proposition that jeopardy attaches when a jury is empaneled. The court explicitly adopted this reading of Downum in *Illinois v. Somerville,* 410 U. S. 458, 467-68 (1973), and *Serfass v. United States,* 420 U. S. 377, 388 (1975)."

We know that this was not the rule at the common law, nor at the time that the Constitution was adopted.

4 W. Blackstone, commentaries 335-38; *Green v. United States,* 355 U. S. 184, 198 (1957) (Frankfurter, J. dissenting). It is not fair to say that it emerged as a part of the American common law, in much the same manner as "beyond a reasonable doubt". *In re Winship,* 397 U. S. 358 (1970), for the model penal code commission, a learned group, formulated the rule that Montana adopted, with a tentative draft in 1956, Model Penal Code § 109, Comment (Tent. Draft No. 5, 1956), and an official Draft in 1962, Model Penal Code § 108.4 (Proposed Official Draft, 1962), both before *Downum.* And See: 77 *Harv. Law Review* 1272, 1286, for a number of states that do not follow the federal rule.

So is there a reason for the rule? And a reason that approaches constitutional mass? The difference in time between the federal rule and the Montana rule is negligible, and the only intervening factor of any significance is that cited by *Wade v. Hunter,* 336 U. S. 684, 689 (1949), "What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments". (That was a General Courts Martial where the tribunal had heard all but two witnesses.) This has been construed to mean that a defendant has a valued right to a particular jury that has just been selected, a right of constitutional dimensions. We submit that the right is more akin to the speedy trial right for the defendant to have his trial completed, to get it over with, rather than to have a mistrial declared, and a retrial later. "It is, after all, that possibility—the chance to 'end the dispute then and there with an acquittal,' *United States v. Jorn,*

supra, at 484—that makes the right to a trial before a particular tribunal of importance to a defendant". *Illinois v. Somerville, supra,* at p. 475 (White, J., dissenting) and continuing, at 476, " 'the trial judge must recognize that lack of preparedness by the government . . . directly implicates policies underpinning both the double jeopardy provisions and the speedy trial guarantee.' (Jorn), at 486".

But that right has nothing to do with not being twice tried, for nothing has been submitted to that jury until the first witness is sworn. "Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Serfass, supra,* at 391.

". . . the 'constitutional policies underpinning the Fifth Amendment guarantee' are not implicated before that point in the proceedings at which 'jeopardy attaches'. *United States v. Jorn,* 400 U. S. at 480. As we have noted above, the court has consistently adhered to the view that jeopardy does not attach until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge'. Id. at 479. This is by no means a mere technicality, nor is it a 'rigid' mechanical rule. It is, of course, like most legal rules, an attempt to impart content to an abtraction." *Serfass v. United States,* at 390. Justice Tuttle commenced his opinion by stating, "the tension between federalism and the doctrine of selective incorporation of Bill of Rights guarantees via the Fourteenth Amendment inevitably generates appeals such as this." (Jur. St. p. 13). It may well be that his observation is the reason why this case was accepted, but we don't see that dichotomy. We

think this court has imparted content to an abstraction, by determining that jeopardy attaches when the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge. We think that the Montana rule is within that point. We think that if the States want to adopt more rigid rules, rules that cause jeopardy to attach even earlier, it is not only within their prerogative, but it breaches no constitutional right.

Illustrative of the point is the Criminal Appeals Act of 1907 (Act of March 2, 1907, c. 2564, 34 Stat. L. 1246) where the government was permitted to take a writ of error ". . . From the decision or judgment sustaining a speical plea in bar, when the defendant has not been put in jeopardy . . .". Congress could just as easily have added, "after the first witness is sworn" (in which case we would not be here today), or, "after the jury is empaneled and sworn". Neither would infringe upon the constitutional right of the defendant against double jeopardy, one would just be more rigid, as in the case of some states. Putting it another way, have the federal rules of evidence, enacted by Congress, obtained constitutional stature, for they certainly affect substantive rights? If Congress were now to permit appeals by the government until after the first witness is sworn, in jury cases, would this be unconstitutional?

All of the other arguments advanced relative to the burdens upon the defendant, e. g., the anxiety of getting ready for trial, the financial strain of preparing for the first trial, etc., in the final analysis, are just as true in a non-jury case, and just as true just before the impaneled jury was sworn as they are just after the first witness is sworn. They may well fall within the realm of the desires

of the defendant, but the controlling question is when do they reach constitutional mass under the double jeopardy provisions of the Fifth Amendment?

"The threshold question is thus whether the federal attachment of jeopardy rule is a product of constitutional exegesis or simply a nonconstitutional consequence of the Supreme Court's supervisory power over federal courts and federal officials", Justice Tuttle, in the opinion below (Jur. St. p. 20). The opinion distinguishes *Williams v. Florida*, 399 U. S. 78 (1970), and *Apodaca v. Oregon*, 406 U. S. 404 (1972) (and, presumably, *Johnson v. Louisiana*, 406 U. S. 356 (1972)), "as non-constitutional rules in federal as well as state courts. That is, neither requirement was termed a sine qua non of the jury trial right protected by the Sixth Amendment in federal court, and thus neither —under established incorporation doctrine—was found to be indispensable in state proceedings." (Jur. St. p. 23). Is the distinction in the instant case "indispensable"? The Model Penal Code finds no distinction, and places the point of attachment of jeopardy at the same place, in both jury and non-jury cases. The "valued right" concept, as applied to the particular tribunal, ought to be even more important in the non-jury case, for at least then counsel has some knowledge of the predilections of the trier of the facts.

We submit that the distinctions in the past have arisen when the choice as to when jeopardy should attach centered on when the jury was sworn versus when the jury had reached its verdict. The Model Penal Code used "after the first witness was sworn", to make the rule the same in both jury and non-jury cases. No case has argued that distinction.

MANIFEST NECESSITY

"Manifest Necessity" does not appear to be a proper subject for this appeal, jurisdictionally. Since the State found that jeopardy had not attached, the question of manifest necessity has not been ruled upon by any state court in this action. It appears for the first time in the federal district court.

CONCLUSION

In conclusion, Appellant asks that the Ninth Circuit Court of Appeals' decision be reversed, and that the Montana statute, holding that jeopardy attaches in a jury trial at the time when the first witness is sworn be held constitutional.

Respectfully submitted this 6th day of June, 1977.

Respectfully submitted,

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